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In the Supreme Court of the United States

OCTOBER TERM, 1994

OKLAHOMA TAX COMMISSION, PETITIONER

v.

CHICKASAW NATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

PAUL A. ENGELMAYER
Assistant to the Solicitor General

ELIZABETH ANN PETERSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTIONS PRESENTED

1. Whether Oklahoma's motor fuels excise tax may be imposed upon fuel sold by Chickasaw Nation retail stores on tribal trust land.

2. Whether Oklahoma's income tax may be imposed upon members of the Chickasaw Nation who are employed by the Nation but who reside outside of Indian country.

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INTEREST OF THE UNITED STATES

This case concerns the taxing authority of Oklahoma over the Chickasaw Nation and its members. Because the United States has a special relationship with the Chickasaw Nation and other Indian Tribes and holds the land at issue in trust, it has an interest in the development of sound principles of taxation in this setting.

STATEMENT

1. Respondent Chickasaw Nation (Tribe) is a federally recognized Indian Tribe on whose behalf the United States holds lands in Oklahoma in trust. The Tribe commenced this suit in 1991 seeking an injunction barring petitioner

Oklahoma Tax Commission from enforcing six state taxes against the Tribe and its members. Pet. App. 2a. Two taxes remain at issue at this stage of the litigation.

First, Oklahoma imposes a 16-cents-per-gallon excise tax on motor fuels. See Okla. Stat. Ann. tit. 68, §§ 501-531 (West 1992). The Tribe owns and operates, on tribal trust land, two retail convenience stores that sell such fuel. The Commission generally exempts from the tax fuel sold by the Tribe's stores to its members, but not sales to other persons. Pet. App. 12a-13a. The Tribe argued that the legal incidence of the fuel tax falls on the retailer, and that it is therefore unlawful to impose that tax on fuel sold by the Tribe. Second, Oklahoma imposes a tax "upon the Oklahoma taxable income of every resident or nonresident individual" (Okla. Stat. Ann. tit. 68, § 2355 (West 1992)). The Tribe argued that it is unlawful to impose the income tax on the wages of its 275 employees, who work on tribal trust land. Pet. App. 33a.

2. The district court upheld imposition of the fuel tax to fuel sold by the Tribe's stores, holding that the State's interests outweigh those of the Tribe. Pet. App. 35a-37a. The court noted that States have an interest in raising revenues, and that that interest is strongest when the tax is directed at goods whose value derives from off-reservation activity, and when the taxpayer benefits from state services. *Id.* at 36a. Those factors are present here, the court reasoned, because the Tribe's stores are engaged solely in resale, because revenues from the tax finance construction of roads outside Indian country, and because the fuel is mostly used on roads outside Indian country. *Id.* at 36a-37a. The court also observed that, in practice, fuel taxes are "included in the retail price at the pump," *id.* at 35a, and that exempting the Tribe's stores from the tax would allow the Tribe "to market an exemption from state taxation to persons who would normally do their business

elsewhere." *Id.* at 37a (quoting *Washington* v. *Confederated Tribes of the Colville Indian Reservation* (*Colville*), 447 U.S. 134, 155 (1980)). Finally, the court held (Pet. App. 38a) that the Tribe's challenge to the income tax had been mooted by a recent decision of the Tenth Circuit holding that, absent congressional authorization, a State may not tax the income of tribal members who work on a reservation, but it may tax the wages of employees who are not members of the Tribe. *Sac and Fox Nation* v. *Oklahoma Tax Comm'n*, 967 F.2d 1425, 1428-1430 (1992), vacated in part, 113 S. Ct. 1985 (1993).

3. On appeal by the Chickasaw Nation, the court of appeals held that the Commission cannot apply the motor fuel tax to fuel sold by the Tribe's stores. The district court had erred, the court of appeals explained, in applying a balancing inquiry based on the "economic assumption[]" that the tax is passed along to fuel purchasers. Pet. App. 13a, 16a. Instead, the pertinent issue is whether the legal incidence of the fuel tax falls upon the tribal retailers, as determined by a "fair interpretation of the taxing statute as written and applied." *Id.* at 9a (quoting *California Bd. of Equalization* v. *Chemehuevi Tribe*, 474 U.S. 9, 11 (1985) (per curiam)); Pet. App. 13a.

The court of appeals found "the clear import" of the Oklahoma tax code to be that the fuel tax falls on the retailer and that a distributor is a mere "transmittal agent for the taxes imposed on the retailer." Pet. App. 13a-14a. The distributor is required to remit to the State, "*on behalf of a licensed retailer*," the amount of fuel taxes due, *id.* at 13a (quoting Okla. Stat. Ann. tit. 68, § 505(B)-(C) (emphasis added)), and, if a distributor is unable to recover taxes due from a retailer, it may receive a credit against its tax liability in the unpaid amount of those taxes. Pet. App. 13a. By contrast, the court observed, state law requires the retailer to pay the tax to the distributor, and

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thus the retailer is legally "responsible for paying the tax." *Id.* at 14a (citing Okla. Stat. Ann. tit. 68, § 505).

Similarly, the court of appeals concluded that, as between the retailer and the retail purchaser, the tax falls on the retailer. Oklahoma's fuel tax law (unlike its cigarette tax law) does not require the tax to be included in the retail price charged to customers. Pet. App. 13a. And while the tax imposed on the retailer may in fact "ultimately [be] passed on to the consumer at the pump, * * * [t]he question of who bears the ultimate economic burden of the tax is distinct from the question of on whom the tax has been imposed." *Id.* at 14a (citing *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 151 n.15 (1980), and *Memphis Bank & Trust Co.* v. *Garner*, 459 U.S. 392, 397 (1983)). Because the fuel tax is directly imposed on the Tribe's stores, the court of appeals concluded that "preemption is presumed absent an explicit statement from Congress that state law shall apply," and here Congress has made no such statement. Pet. App. 15a-16a.

The validity of the income tax was largely resolved by *Oklahoma Tax Comm'n* v. *Sac and Fox Nation*, 113 S. Ct. 1985 (1993), handed down while this case was pending on appeal. Pet. App. 20a. In *Sac and Fox*, this Court held that the principle of *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973), that a State may not tax Indians who reside on a formal reservation applies as well to Indians who live elsewhere within Indian country. 113 S. Ct. at 1992.[1] Based on that decision, the court of appeals held that Oklahoma may not tax the income of members of the Chickasaw Nation who live and work on trust lands.

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[1] Indian country includes "formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States." *Sac and Fox*, 113 S. Ct. at 1991 (citing 18 U.S.C. 1151).

Pet. App. 23a. This Court, however, had declined to review the Tenth Circuit's ruling in *Sac and Fox* that a Tribe's employees who are not tribal members do not enjoy an immunity from state taxation. 113 S. Ct. 466 (1992). Accordingly, the court of appeals held in this case that Oklahoma may tax the income of a Tribe's nonmember employees unless doing so conflicts with a treaty or statute or "impermissibly interfere[s] with a tribe's ability to govern itself," and that taxing the income of the Chickasaw Nation's nonmember employees does neither. Pet. App. 21a. That ruling is not at issue here.

The court of appeals held, however, that Oklahoma may not tax the wages of members of the Chickasaw Nation who work for the Tribe itself, even if they reside outside Indian country. It reasoned that those members do not enjoy the "*McClanahan* presumption" that bars state taxation absent congressional authorization, because residence in Indian country is an important component of that presumption. Pet. App. 25a. However, the court held that such a tax is invalid if it either interferes with tribal self-government or impairs a right granted or reserved by federal law, *id.* at 27a, and that the Chickasaw Nation's treaty with the United States establishes such a right. In the court's view, that treaty confers broader rights upon Indians than does the United States' treaties with other Tribes, *id.* at 27a-30a, because it provides that "no territory or state shall ever have [a] right to pass laws for the government of the [Chickasaw Nation] and their descendants," and that "the U.S. shall forever secure said [Chickasaw] Nation from, and against all laws" inconsistent with that treaty. *Id.* at 28a-29a (quoting 7 Stat. 333). The court concluded that the treaty makes "abundantly clear" that Oklahoma may not apply its income tax to present-day tribal members who work for

the Tribe, and that "[r]esidency is simply not relevant to this determination." Pet. App. 29a-30a.

SUMMARY OF ARGUMENT

I. In the area of state taxation of Indian Tribes and tribal members, this Court has long applied a *per se* rule, under which such taxation is prohibited except where expressly authorized by Congress. The court of appeals, having determined that under state law the legal incidence of Oklahoma's motor fuels tax falls on the Indian retailers, correctly recognized that the *per se* rule applies, and that, absent congressional authorization, Oklahoma lacks jurisdiction to impose that tax on Indian retailers.

The Commission's claim that the *per se* rule should be replaced with a broad-ranging balancing inquiry should be rejected. The immunity that Tribes have long enjoyed from state taxation is rooted in the Constitution itself, which recognizes the retained sovereignty of Tribes vis-a-vis the States and the immunity from taxation as a hallmark of their distinct sovereign status. The continuing immunity from state taxation also reflects the fact that a State's power to tax Indians directly could disrupt the Tribe's ability to govern itself, and that a State can usually achieve its legitimate fiscal and regulatory objectives by imposing the tax upon the non-Indian participants in a transaction. In this case, to render fuel sold by tribal retailers to non-Indians taxable, Oklahoma need only amend its fuel tax law to place the legal incidence of the tax either on the non-Indian fuel distributors or purchasers. That is the approach taken by other States with large Indian populations, including the Commission's *amici*. The *per se* rule also has the advantages of practicality and clarity, as these *amici* recognize.

The court of appeals reasonably concluded that the legal incidence of the fuel tax falls on the retailer, based on the

structure of Oklahoma's fuel-tax code. The Commission's claim that the Hayden-Cartwright Act, 4 U.S.C. 104, authorizes direct state taxation of Indians was not raised below or in the petition for certiorari. In any event, that Act does not make it "unmistakably clear" that States may tax Tribes or individual Indians, *County of Yakima* v. *Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 258 (1992), because it does not specifically refer to Indian reservations or to Indians who sell or buy motor fuel.

II. The Chickasaw Nation's treaty with the United States precludes Oklahoma from taxing the income of members of the Tribe who work for the Tribe. That treaty, which resulted from unique historical factors, confers upon the Tribe unusually explicit immunity from state regulation: It protects tribal descendants against any state laws "for the government of the [Chickasaw] Nation." Income taxation of tribal-member employees is clearly such a law, and any ambiguity in the construction of the treaty must be resolved in favor of the Tribe.

ARGUMENT

I. OKLAHOMA MAY NOT APPLY ITS EXCISE TAX ON MOTOR FUEL TO FUEL SOLD BY THE CHICKASAW NATION'S RETAIL STORES

1. In many areas involving the application of state law to matters involving Indians in Indian country—especially in the relations of non-Indians with Indians—this Court has engaged in a particularized inquiry into the federal, tribal, and state interests at stake. "The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *California* v. *Cabazon Band of Mission Indians*, 480 U.S.

202, 216 (1987) (quoting *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 334-335 (1983)); see also *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 176-177 (1989); *Ramah Navajo School Bd.* v. *Bureau of Revenue*, 458 U.S. 832, 838-839 (1982).

However, "[i]n the special area of state taxation of Indian tribes and tribal members, [the Court] ha[s] adopted a *per se* rule." *Cabazon*, 480 U.S. at 215 n.17; see also *Yakima*, 502 U.S. at 258, 267 (noting this "categorical approach"); *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148 (1973). Under that rule, state taxation of Tribes and individual Indians is permitted only where authorized by Congress. Congress "has not done so often, and the Court consistently has held that it will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear." *Cabazon*, 480 U.S. at 215 n.17 (quoting *Montana* v. *Blackfeet Tribe*, 471 U.S. 759, 765 (1985)); *Yakima*, 502 U.S. at 258. The Court has applied this principle in holding that States may not tax income earned by Indians on their reservation, *McClanahan*, *supra*, Indian-owned personal property situated on the reservation, *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 480-481 (1976); *Colville*, 447 U.S. at 163-164; *Bryan* v. *Itasca County*, 426 U.S. 373 (1976), or on-reservation sales and purchases by tribal members. *Department of Taxation & Finance* v. *Milhelm Attea & Sons*, 114 S. Ct. 2028, 2031 (1994); *Yakima*, 502 U.S. at 258; *Moe*, 425 U.S. at 475-481; *Colville*, 447 U.S. at 160.

Accordingly, in analyzing the application of a state tax to goods purchased by non-Indians from Indian retailers within Indian country, the critical determination is which party bears the legal incidence of the tax. If the tax falls upon the retailer, it is subject to the *per se* rule barring state taxation of Indians absent an "unmistakably clear"

showing of congressional authorization. However, if the tax falls upon the purchaser, then the State may ordinarily impose the tax, *Chemehuevi*, 474 U.S. at 12; *Colville*, 447 U.S. at 150-151; *Moe*, 425 U.S. at 482, and it may also impose upon the Indian retailer the "minimal burden" of collecting the tax from the purchasers. *Milhelm Attea*, 114 S. Ct. at 2035; *Colville*, 447 U.S. at 151; *Moe*, 425 U.S. at 482, 483.[2] The determination of the party on whom the legal incidence of a state tax falls is to be based upon "a fair interpretation of the taxing statute as written and applied." *Chemehuevi*, 474 U.S. at 11.

2. a. In holding that the Commission could not apply Oklahoma's excise tax on motor fuels to sales by tribal retailers to non-Indian consumers, the court of appeals applied those familiar principles. It first held that a fair interpretation of Oklahoma's motor fuels tax statute is that the legal incidence of that tax falls upon the Indian retailer, not the consumer. Pet. App. 13a-14a. It next held

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[2] Even where the legal incidence of a tax falls on the non-Indian purchaser, a State's authority is not unlimited, for it remains subject to the Court's particularized balancing inquiry. The basis for state taxation is strongest when Indians "impor[t] a product onto the reservations for immediate resale to non-Indians," and thus are merely marketing an exemption from state tax. *Cabazon*, 480 U.S. at 219; see *Colville*, 447 U.S. at 155. But when Indians sell items or services that have value generated in Indian country by activities in which Indians have a significant interest, state taxation is preempted. *Cabazon*, 480 U.S. at 219-222; *Indian Country, U.S.A., Inc.* v. *Oklahoma*, 829 F.2d 967, 983-987 (10th Cir. 1987), cert. denied, 487 U.S. 1218 (1988). Analogously, when the legal incidence of a tax falls on a non-Indian retailer who sells to Indian purchasers, that tax may not be imposed if it implicates significant Indian interests or value generated in Indian country and the commerce in question is subject to pervasive federal regulation. See *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U.S. 685, 688-691 (1965); *Central Machinery Co.* v. *Arizona Tax Comm'n*, 448 U.S. 160, 163 (1980).

that, because there is no "explicit grant of congressional approval" to impose such a tax on Indian retailers, Oklahoma lacks jurisdiction to do so. *Id.* at 16a.

In light of the straightforward application of precedent below, the Commission's principal argument is nothing less than an attack on the *per se* rule itself, which the Commission asks the Court to discard as an empty "formalism." Br. 13, 14. The Commission urges that the inquiry should instead be whether the state interests served by imposition of such a tax on Indians outweigh the tribal interests at stake. Br. 14-33. But the *per se* rule in this area has deep constitutional and historical roots and is supported by sound policy considerations. Congress has not altered that rule, and the Commission offers no valid reason for this Court to replace it with a broadranging balancing inquiry.

b. The Federal Government's power over Indian affairs derives from the Commerce Clause of the Constitution, Art. I, § 8, Cl. 3, and "from the necessity of giving uniform protection to a dependent people." *Williams* v. *Lee*, 358 U.S. 217, 219 n.4 (1959) (citing *United States* v. *Kagama*, 118 U.S. 375 (1886)). The Commerce Clause grants to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, Cl. 3. The vesting of power in Congress over these three aspects of commerce reflects the Framers' firm determination to supply a check against actions by any one State that might be inconsistent with the interests of the Nation as a whole. See, *e.g.*, *Wardair Canada, Inc.* v. *Florida Dep't of Revenue*, 477 U.S. 1, 7-8 (1986); *McLeod* v. *J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944). Of particular relevance here, the decision to vest Congress with exclusive power over Indian affairs constituted a deliberate departure from the arrangement under the Articles of Confederation, which had sought to

divide authority over that subject between Congress and the States.

The Articles of Confederation had granted Congress "the sole and exclusive right and power * * * of regulating the trade and managing all affairs with the Indians"; but that grant of authority excepted Indians who were "members of any of the States," and it was subject to a proviso "that the legislative right of any State within its own limits be not infringed or violated." Art. IX. James Madison explained that that ambiguous reservation of authority to the States was an "endeavor to accomplish impossibilities," because it sought "to reconcile a partial sovereignty in the Union, with complete sovereignty in the States." *The Federalist* No. 42, at 269 (C. Rossiter ed. 1961). The division of authority also proved unsatisfactory in practical operation, because the proviso was relied upon by Georgia and North Carolina as authority for them to make treaties with the Indians regarding their land and other objects, and thereby "to annul the power itself." *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

In response to those difficulties—and to the resulting potential for individual States to undermine the security of the United States and their collective commitments to the Indians—a committee of the Continental Congress submitted a report in August 1787, while the Constitutional Convention was sitting. The committee recommended that if the States did not cede the Indian territory within their borders to the United States, they should "accede to Congress's managing, exclusively, all affairs with the Cherokees, Creeks, and other independent tribes within the limits of said States, so that Congress in either case may have the acknowledged power of regulating trade, and making treaties with those tribes, and of preventing on their lands, the intrusions of the white people." 33 J. Continental Cong. 460 (1936); see

Worcester, 31 U.S. (6 Pet.) at 559. The Framers embraced the latter solution, and, "[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law." *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 234 (1985) (*Oneida II*). Accordingly, the Constitution gives the President, with the advice and consent of the Senate, the power to make Treaties, including Treaties with the Indians (Art. II, § 2, Cl. 2); declares those Treaties to be "the supreme Law of the Land" (Art. VI, Cl. 2); and vests in Congress, unencumbered by the reservations of state authority under the Articles of Confederation, the power to regulate commerce "with the Indian Tribes."[3] Moreover, the parallel phrasing of the Indian and Foreign Commerce Clauses—both referring to commerce "with" the Tribe or Nation—confirms that the Framers contemplated the continuation, through the national government, of bilateral relations between the United States and the Indian Tribes as distinct sovereign entities. *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 159 & n.19 (1982).[4]

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[3] See *Oneida II*, 470 U.S. at 234-235 n.4 ("Madison cited the National Government's inability to control trade with the Indians as one of the key deficiencies of the Articles of Confederation, and urged adoption of the Indian Commerce Clause, Art. I, § 8, Cl. 3, that granted Congress the power to regulate trade with the Indians."); Abel, *The Commerce Clause in the Constitutional Convention and the Contemporary Comment*, 25 Minn. L. Rev. 432, 467-468 (1941).

[4] See *Worcester*, 31 U.S. (6 Pet.) at 559 ("The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently, admits their rank among those powers who are capable of making treaties."); see also *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (Tribes are "domestic dependent nations").

This Court's early decisions reflected the understanding "that Indian tribes were wholly distinct nations within whose boundaries 'the laws of [a State] can have no force,' " and with whom all intercourse was to be conducted by the United States. *Mescalero Apache*, 462 U.S. at 331 (quoting *Worcester*, 31 U.S. (6 Pet.) at 560); see also *Yakima*, 502 U.S. at 257. Over time, that conception of exclusive Indian sovereignty has given way to a recognition that, in light of the increasing interaction between (and economic interdependence of) non-Indians and Indians, States should have some latitude to protect their valid interests when affected by activities in Indian country. *Yakima*, 502 U.S. at 257-258. Thus, the Court has recognized "the rights of States, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands," and to regulate their relations with Indians "unless the application of state laws 'would interfere with reservation self-government or impair a right granted or reserved by federal law.' " *Ibid.* (quoting *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 75 (1962)).

At the same time, this Court has adhered to the *per se* rule in the area of state taxation of Tribes and their members. *Yakima*, 502 U.S. at 258, 267; *Cabazon*, 480 U.S. at 215 n.17; *Mescalero Apache*, 411 U.S. at 148. The continuing immunity of Indians from state taxation in Indian country is rooted in the Constitution itself and in the tradition of relations with the Indian Tribes. Most significantly, the power to tax members of a political community is a core hallmark of sovereign authority. Direct state taxation of a Tribe or its members would impinge the Tribe's historic sovereignty, as reflected in the Constitution's grant of authority to Congress to regulate commerce "with the Indian Tribes," and in the

exclusion of "Indians not taxed" from the enumeration upon which the apportionment of Representatives and direct taxes is based. Art. I, § 2, Cl. 3; *id.* Amend. XIV, § 2. Second, a State's power to tax could be abused to disrupt the Indian sovereign's ability to govern itself:

> In the area of state taxation, * * *, Chief Justice Marshall's observation that "the power to tax involves the power to destroy," *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819), has counseled a more categorical approach: "[A]bsent cession of jurisdiction or other federal statutes permitting it," we have held, a State is without power to tax reservation lands and reservation Indians.

Yakima, 502 U.S. at 258. Third, it is unnecessary for a State to tax a Tribe or its members directly, because a State can typically achieve its legitimate regulatory objectives by imposing the tax upon the non-Indian participants in the transaction, such as the non-Indian purchasers of goods from reservation Indians. Thus, "the federal tradition of Indian immunity from state taxation is very strong and * * * the state interest in taxation is correspondingly weak. Accordingly, it is unnecessary to rebalance these interests in every case." *Cabazon*, 480 U.S. at 215 n.17.[5] In the rare case where a sound reason

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[5] Claiming that the decision below imposes "a dramatic restriction on state taxing authority" (Br. 14), the Commission argues that this Court has abandoned the *per se* rule in favor of a "presumption" (Br. 19) against state jurisdiction to impose direct taxes on Indians that may be overcome by a "compelling" state interest (Br. 22). However, the cases on which the Commission relies do not support that proposition, but instead indicate that the *per se* rule is "categorical," *Yakima*, 502 U.S. at 258, and that the "presumption" against direct taxation of Indians in Indian country may be overcome only by a showing of express congressional authorization. See, *e.g.*, *Sac and Fox*, 113 S. Ct. at 1989, 1990, 1993; *Blackfeet Tribe*, 471 U.S. at 765.

exists for taxing a Tribe or its members directly, it is reasonable to expect Congress to authorize such taxation. See *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991).

c. The Commission argues (Br. 14, 26) that the application of the *per se* rule in this case "disregard[s] economic realities" and allows the Chickasaw Nation to exploit "an exemption from state taxation" (quoting *Colville*, 447 U.S. at 155) by selling fuel tax-free to non-Indian consumers, thereby drawing business from non-Indian retailers and depriving Oklahoma of revenue. However, to render fuel sold by Indian retailers to non-Indians fully taxable, the State need only amend its fuel tax law to place the legal incidence of its fuel tax not on retailers, but on the ultimate purchasers.[6] Such a tax would be analyzed under this Court's particularized balancing inquiry, and, under *Moe* and *Colville*, there is little doubt that it would be sustained.[7]

The Commission also contends (Br. 30-31) that the *per se* rule fosters ambiguity and invites "gamesmanship and

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[6] It is true that, in other contexts, the "practical operation" (Pet. Br. 31) of a tax is decisive. But the cases on which the Commission relies did not involve the special considerations implicated by direct state taxation of an Indian Tribe or its members. See *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 278-279 (1977) (tax on doing business in State claimed to interfere with interstate commerce); *Detroit* v. *Murray Corp.*, 355 U.S. 489, 492-493 (1958) (tax on government subcontractor claimed to infringe United States's immunity from state taxation). Of course, where a tax does not fall directly on Indians but instead is claimed to interfere indirectly with tribal self-determination, the practical consequences of the tax are highly pertinent. See, *e.g.*, *Milhelm Attea*, 114 S. Ct. at 2035.

[7] To comply with the *per se* rule, however, the Commission would have to expand its exemption for Indian purchasers (which is now limited to those who drive tribally owned vehicles (Pet. App. 12a) to cover all tribal members.

manipulation." On the contrary, as this Court has observed, that rule has the advantage of "practicality," because, by establishing categorically that congressional authorization is necessary before a State may tax a Tribe or its members, the rule sets a clear standard on which both States and Tribes can rely. See *Yakima*, 502 U.S. at 267 (without a *per se* rule, "litigation would surely engulf the States' annual assessment and taxation process, with the validity of each levy dependent upon a multiplicity of factors that vary from year to year, and from parcel to parcel"). Indeed, the Commission's *amici*, who are eleven States with large Indian populations, ask this Court to reaffirm the *per se* rule, because it "provide[s] a reasonably bright-line standard which * * * responds to the need for substantial certainty as to the permissible scope of state taxation authority." S.D. Amici Br. at 1-2. Those eleven States have each taxed fuel sold by Indian retailers to non-Indians, by placing the legal incidence of those taxes either upstream (on the distributor) or downstream (on the consumer) of the retailer. See Br. in Opp. 5-6 & n.6.

3. The Commission also contends (Br. 33-39) that the court of appeals erred in holding that the legal incidence of Oklahoma's fuel tax falls on the Indian retailer. Instead, it claims that the tax falls either on the consumer (Br. 33), or, as it argued in the lower courts, on the distributor (Br. 39). The court of appeals evaluated the State's fuel-tax laws under the correct legal standard—the "fair interpretation" standard of *Chemehuevi*—and the pertinent issue therefore is whether that interpretation was unreasonable. *Haring* v. *Prosise*, 462 U.S. 306, 314 n.8 (1983); *Butner* v. *United States*, 440 U.S. 48, 58 (1979); *Propper* v. *Clark*, 337 U.S. 472, 486-487 (1949). Although Oklahoma's tax laws do not explicitly identify the party who bears the legal incidence of the fuel tax, the court of

appeals' holding that it falls on the retailer is the fairer interpretation of those laws, and, in any event, is plainly reasonable.[8]

As the court of appeals recognized (Pet. App. 9a), the fact that the Oklahoma tax code contains no explicit "pass-through provision [] or collection requirement[]" does not alone establish that the fuel tax falls on the retailer, as opposed to the purchaser. *Chemehuevi*, 474 U.S. at 11. However, the structure of that code confirms that the tax is meant to fall on the retailer. The code requires that the distributor remit to the State the amount of fuel taxes due. Okla. Stat. Ann. tit. 68, § 505(B)-(C). However, the code requires the retailer to pay to the distributor all taxes due, *id.* § 505(E), and provides that fuel taxes "remitted by a distributor *on behalf of a licensed retailer* * * * that are subsequently determined to be uncollectible by the distributor may be credited against subsequent motor fuel tax liability imposed by law upon such distributor." *Id.* § 505(C) (emphasis added). Thus, as the court of appeals noted, the State makes the distributor a mere "transmittal agent for the taxes imposed on the retailer." Pet. App. 14a.[9] The tax code contains, however, no comparable

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[8] The court of appeals' nuanced analysis of legal incidence is evidenced by the fact that, in the same opinion, it rejected the Chickasaw Nation's argument that Oklahoma's beer tax falls by law on the Indian retailers, holding instead that the beer tax falls on the distributor. Pet. App. 7a-12a. See also *Indian Country, U.S.A.*, 829 F.2d at 984 (holding that legal incidence of Oklahoma's sales tax falls on consumer, and not, as Tribe claimed, on retailer).

[9] Further evidence that, as between the distributor and the retailer, the fuel tax is imposed at the retail level is supplied by (1) the fact that sales between distributors are exempt from taxation (Okla. Stat. Ann. tit. 68, § 507) but sales from a distributor to a retailer are subject to taxation (*id.* § 505 (E)); and (2) the fact that, for his services as a collection agent, the distributor is authorized to retain 2.5% of the fuel

provisions requiring the purchaser to pay to the retailer all taxes due, or shielding retailers from liability where payments due from an ultimate purchaser proved uncollectible. The absence of such provisions strongly indicates, as the court of appeals concluded, that the legislature intended that the fuel tax be imposed at the retail level. Compare *Chemehuevi*, 474 U.S. at 11-12 (noting that in *Colville*, legal incidence was on the purchaser because "the statutory scheme required consumers to pay the tax whenever the vendor was untaxable," and that the California cigarette-tax scheme at issue likewise "clearly seems to place on consumers the obligation to pay the tax for all previously untaxed cigarettes").

That understanding is confirmed by contrasting Oklahoma's motor-fuel tax laws to its cigarette-tax laws. The cigarette tax is clearly imposed on the ultimate purchaser: the tax code states that that tax is "levied upon the *sale, use, gift, possession, or consumption* of cigarettes" within the State. Okla. Stat. Ann. tit. 68, § 302 (West 1992) (emphasis added); see Pet. App. 13a. No comparable language appears in the fuel-tax code, which instead imposes an excise tax on the fuel at the time that it is first sold by the distributor, whether or not it is ever sold to a consumer. *Id.* § 502 ("There is hereby levied an excise tax * * * upon the sale of each and every gallon of gasoline sold, or stored and distributed."). Furthermore, unlike the cigarette-tax laws, which impose criminal liability on the ultimate purchaser for possessing cigarettes on which the tax has not been paid, *id.* § 306, the fuel-tax laws impose no liability of any kind on a consumer for the purchase, possession, or use of untaxed fuel. However, the fuel-tax

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taxes he collects (*id.* §§ 502, 506A) but the code authorizes no such recompense for the retailer.

laws do make it unlawful for the distributor or the retailer "to sell or offer for sale in this state, motor fuel or diesel fuel while delinquent in the payment of any excise tax due the state" *Id.* § 505(C). The court of appeals thus reasonably concluded that the incidence of the fuel tax falls upon the retailer. Compare *Gurley* v. *Rhoden*, 421 U.S. 200, 205 (1975) (legal incidence of federal gasoline tax falls on producer because "if the producer does not pay the tax, the Government cannot collect it from his vendees").[10]

The Commission argues (Br. 36) that the tax code's exemptions for sales to various classes of fuel purchasers[11] establish that the tax is imposed on the purchaser. However, the existence of such exemptions does not establish the incidence of that tax. Exemptions routinely exist in tax codes in which the incidence of the tax falls earlier in the distribution chain, including the codes of States that impose a fuel tax on the distributor. See Br. in Opp. 5-6 n.5; *e.g.*, Ariz. Rev. Stat. Ann. §§ 28-1501, 28-1520 (West Supp. 1993); Cal. Rev. & Tax. Code Ann. §§ 7351, 7401 (West Supp. 1994); Mont. Code Ann. §§ 15-70-204, 15-70-221 (1993); N.Y. Tax Law §§ 284, 289-c (McKinney 1986); N.C. Gen. Stat. §§ 105-434(a), 105-439 (1994); see also *Gurley*, 421 U.S. at 205-206 (existence of exemptions for certain purchasers in federal gasoline tax statute "is not proof that Congress laid the tax upon the purchaser-consumer"). Such exemptions ensure that persons earlier in the

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[10] Contrary to the Commission's claim that the retailer's duty to pay taxes is unenforceable (Br. 38 n.20), the tax code confers upon the Commission itself the power "to enforce the provisions of this Code and to promulgate any reasonable rules and regulations with respect thereto." Okla. Stat. Ann. tit. 68, § 203 (West 1992).

[11] Exempt purchasers include the United States (Okla. Stat. Ann. tit. 68, §§ 501(B), 502.2(B),, 502.3(B),, 502.4(B),, 502.5(B),, 502.6(B),, 502.7(B), farmers (*id.* § 509(B)), specified aircraft (*id.* § 508(a), passenger buses or coaches (*id.* § 509.2(E)), and fire departments (*id.* § 527).

distribution chain do not need to charge the protected purchasers a price that includes a premium reflecting all or some of the State's fuel tax. See, *e.g.*, Okla. Stat. Ann. tit. 68, § 509(e)-(f) and (j) (distributor may deduct amount of fuel sold to exempted agricultural purchasers from amount upon which it must remit tax to State).[12]

4. The Commission's final claim (Br. 23-24) is that the Hayden-Cartwright Act, 4 U.S.C. 104, authorizes direct state taxation of retail sales of fuel by Indian Tribes and tribal members in Indian country. See also S.D. Amici Br. 4-23. The Commission did not raise that claim below, see Pet. App. 16a n.4, or present it in the petition for certiorari, which instead posed the question whether imposition of the State's motor fuel tax on fuel sold by a Tribe is "precluded" by "principles of federal pre-emption

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[12] The phrasing of two code provisions could be read to imply that the consumer will bear the fuel tax. See Okla. Stat. Ann. tit. 68, § 501(C) ("Nothing in this section shall require a distributor, dealer or retailer to collect taxes levied by this act or remit taxes to the state."); *id.* § 509(A) ("Every person actually engaged in farming * * * who has obtained an agricultural exemption permit * * * may purchase such motor fuel without paying the tax."). But no other provision is phrased in that fashion, and another carries the contrary implication by describing an exemption for aircraft fuel as one to which the distributor is "entitled." *Id.* § 508(a). In any event, the fact that the code obliges the retailer to pay the tax, and protects the distributor from a nonpaying retailer while containing no like provisions governing the retailer-to-purchaser step in the distribution chain, is far more powerful evidence of the state legislature's intent regarding legal incidence than the wording of those two provisions. The Commission also relies upon two provisions (*id.* §§ 501(B), 509.2(C)) that render liable a fuel user who fraudulently buys diesel fuel claiming a use exemption and then uses the fuel for a nonexempt purpose. Br. 36. But the imposition of liability on a person who fraudulently claims an exemption does not speak to the issue of whether consumers in general bear the tax, but, rather, merely reflects that the party responsible for defrauding the State of that tax is properly responsible for reimbursing the State for the lost revenue.

or Indian sovereignty." Pet. I. Review is therefore unwarranted. See *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 114 S. Ct. 425, 427 (1993) (per curiam) (Court will consider issues first raised in a merits brief "only in the most exceptional cases"); *Berkemer* v. *McCarty*, 468 U.S. 420, 443 n.38 (1984).

In any event, the Hayden-Cartwright Act does not make it "unmistakably clear," *Yakima*, 502 U.S. at 258; *Cabazon*, 480 U.S. at 215 n.17, that Congress intended to abrogate the traditional immunity of tribal retailers from state taxation. The Act provides, in pertinent part:

> All taxes levied by any State, Territory, or the District of Columbia upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States. Such taxes, so levied, shall be paid to the proper taxing authority of the State, Territory, or the District of Columbia, within whose borders the reservation affected may be located.

4 U.S.C. 104(a). The Act does not mention Indians. As a result, it does not make clear whether the expression "other reservations" applies to Indian reservations, or merely to other reserved land (*e.g.*, national parks or national forests) in the control of the federal government. See *White Mountain Apache*, 448 U.S. at 151-152 n.16 (leaving this question open). The absence of any express reference to Indian reservations is notable, because the Act was added as a floor amendment in the Senate in 1936

to An Act to Amend the Federal Aid Highway Act, 49 Stat. 1519-1522, and the highway statute specifically refers elsewhere to "Indian reservation[s]" and "Indian lands." See § 6, 49 Stat. 1521 (providing for construction and improvement of "Indian reservation roads"); § 3, 49 Stat. 1520 (providing for construction and maintenance of roads "through unappropriated or unreserved public lands, nontaxable Indian lands, or other Federal reservations other than forest reservations").[13] Moreover, even if we assume, *arguendo*, that the Act applies to sales on Indian reservations (and thus implicitly elsewhere within Indian country), the Act does not clearly state that it applies to sales on reservations by *Indian* retailers, or distinguished from non-Indian "licensed traders" and "filling stations."

Application of the Hayden-Cartwright Act to fuel sold by Indian retailers on Indian reservations does not necessarily follow from the purpose of the highway statute in which it was enacted. That statute was passed in 1936 to assist States in highway building programs by providing matching funds. The Hayden-Cartwright Act was added to the legislation to respond to the practice of motorists who purchased gas on federal reservations, thereby escaping state gas taxes. See 80 Cong. Rec. 6913 (1936) (Sen. Hayden). But there was no evidence before Congress, and there were no assertions by legislators, that tax-exempt sales by Indians on Indian reservations had lured customers from non-Indian retailers. Nor does the legislative history contain any discussion of Indians' traditional immunity from direct state taxation. See *id.* at 6907-6914, 8698-8705. It is thus most likely that, in passing

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[13] Compare 80 Cong. Rec. 6908 (1936) (Sen. Hayden, sponsor of bill, describes Section 6 as relating to "Indian reservation roads") with *id.* at 6913 (1936) (Sen. Hayden describes Section 10 as relating to "Government reservations not for governmental use").

the Act, Congress did not consider at all its effect on that immunity.[14] Because it is not "unmistakably clear" (*Yakima*, 502 U.S. at 258) that Congress intended to abrogate that immunity by passing the Hayden-Cartwright Act, the Commission's reliance on the Act as a basis for taxing Indian retailers is misplaced. See also

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[14] The Commission (Br. 23-24) and its amici (S.D. Amici Br. 5-6.) rely on a 1940 opinion of Solicitor of the Interior Margold taking the position that the Act authorizes a State to tax sales of gasoline through commissaries on an Indian reservation. See *Application of Federal and State Taxes to Activities of Menominee Indian Mills*, 57 Interior Dec. 129, 138-140 (1940). That opinion was noted, with neither approval nor disapproval, by Felix Cohen in his treatise on Indian law. See F. Cohen, *Handbook of Federal Indian Law* 264 (1942); see also R. Strickland, et al., *Felix Cohen's Handbook of Federal Indian Law* 412 n.62 (1982); compare S.D. Amici Br. 6 n.2 (claiming that Cohen treatise "agreed" with Solicitor Margold's conclusion). But Solicitor Margold's opinion began by noting that "[i]t is not clear * * * whether the reference to reservations includes Indian reservations." 57 Interior Dec. at 138-139. His conclusion that it did was based on "indications" in the legislative history that, "while slight," suggested that the Act did so apply. *Id.* at 139. Those "indications" were that Section 6 of the highway statute discusses roadways on Indian reservations, suggesting that "attention was called in the consideration of the act to Indian reservations," and that the Act's "reference to 'licensed traders' is particularly suggestive of Indian reservations." *Ibid.* But as we have noted, the absence of a specific reference to Indian reservations in Section 10 (the Hayden-Cartwright Act), in light of the express references to "Indian reservation[s]" and to "Indian lands" elsewhere in the highway statute, may alternatively be viewed as negatively implying that Section 10 does not include Indian reservations. And the term "licensed traders," a term historically associated with non-Indians who trade with Indians, see 16 U.S.C. 261, begs the question of whether the Act was meant to apply to *Indian* retailers of motor fuel. Given Solicitor Margold's view that the Act was not "clear" and his reliance on "slight" indications in legislative history, it is unlikely that he would have concluded that the Act made it "unmistakably clear" that it abrogated Indian immunity from direct state taxation.

South Dakota v. *Bourland*, 113 S. Ct. 2309, 2316 (1993) ("statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit") (quoting *Yakima*, 502 U.S. at 269); *Blackfeet Tribe*, 471 U.S. at 766; *McClanahan*, 411 U.S. at 174; *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930).[15]

II. OKLAHOMA MAY NOT APPLY ITS INCOME TAX TO MEMBERS OF THE CHICKASAW NATION WHO WORK FOR THE NATION BUT WHO LIVE OUTSIDE OF INDIAN COUNTRY

1. Petitioner also argues (Br. 39-47) that the court of appeals erred in holding that the Chickasaw Nation's treaty with the United States bars Oklahoma from taxing the income of tribal members who work for the Tribe but live outside Indian country. That treaty provides in pertinent part:

> The Government and the people of the United States are hereby obliged to secure to the said [Chickasaw] Nation of Red People the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the [Chickasaw] Nation of Red People and their descendants; and that no part of the land granted them

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[15] Because Congress has not granted authorization, the Commission's additional claim (Br. 32-33) that it is authorized to tax Indian consumers directly for purchasing fuel lacks merit. The Commission relies (Br. 33) on this Court's statement that an automobile registration tax tailored to capture the proportion of automobile use occurring off-reservation "might be a different case" from those in which a direct tax was improperly applied to Indians' on-reservation activity, see *Sac and Fox*, 113 S. Ct. at 1993. However, as in *Sac and Fox*, Oklahoma has not undertaken such tailoring, and it is therefore appropriate, as in that case, to "decline to treat the case as if it had." *Ibid.*

> shall ever be embraced in any Territory or State; but the U.S. shall forever secure said [Chickasaw] Nation from, and against, all laws except such as from time to time may be enacted in their own National Councils, not inconsistent with the Constitution, Treaties, and Laws of the United States; and except such as may, and which have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs.

Treaty of Dancing Rabbit Creek, Sept. 27, 1830, Art. IV, 7 Stat. 333. The treaty was entered into with the Choctaw Indians, but in 1837, the Choctaw consented to the formation of a district within their reservation for the Chickasaw, "to be held on the same terms that the Choctaws now hold it," Treaty of Jan. 17, 1837, Art. I, 11 Stat. 573, thereby making the Chickasaw beneficiaries of the treaty. See *ibid.* The treaty was reaffirmed in 1866, see Treaty of Apr. 28, 1866, Arts. X, XLV, 14 Stat. 774, 779-780, and again in 1871, see 25 U.S.C. 71. Pet. App. 29a & n.10.

The court of appeals correctly read the Treaty of Dancing Rabbit Creek to preclude Oklahoma from taxing the income of member-employees of the Chickasaw Nation, regardless whether they reside in Indian country. As the court of appeals observed (Pet. App. 29a-30a), that treaty confers upon the Chickasaw Nation unusually explicit and broad immunity from the operation of state laws. Compare *Sac and Fox*, 113 S. Ct. at 1988 (terms of Sac and Fox Treaty); *McClanahan*, 411 U.S. at 174 (terms of Navajo Treaty); see Pet. App. 27a-28a. In particular, unlike most other Indian treaties, the Treaty of Dancing Rabbit Creek provides unqualified protection against enactment of state "laws for the government of the [Chickasaw] Nation," and provides that that protection extends to the "descendants"

of the Nation. As the Chickasaw Nation has noted (Br. in Opp. 28), only the Creek Nation and the Seminole Nation—two other of the Five Civilized Tribes—have similarly capacious treaty guarantees.

The provisions of the Treaty of Dancing Rabbit Creek reflect the unusual alliance between the Choctaw and the United States in the early 19th century, and the political importance to the United States of inducing the Choctaw to assent to their removal westward. The Choctaw had fought with distinction alongside the United States in battles against the Creek Indians in 1813 and 1814, and with General Andrew Jackson in the Battle of New Orleans in 1814. See Arthur H. DeRosier, Jr., *The Removal of the Choctaw Indians* 35-36 (1970) [hereinafter DeRosier]; compare *Oneida II*, 470 U.S. at 231. Moreover, peaceful removal of the Choctaw west had long been sought by political figures who viewed such removal as a critical impetus to "force other Indian groups to consider their own removal to the West." DeRosier at 46 (because the Choctaw were "a large tribe that was known for its high level of economic, social, and political development, [its] successful removal * * * would be prestigious and would force other Indian groups to consider their own removal to the West"). The Choctaw had assented to one earlier removal from some of their lands in Mississippi to what is now western Arkansas. See Treaty of Oct. 18, 1820, 7 Stat. 210. However, in 1828, a bill forcibly to remove the Choctaw further west had failed in Congress, and, in 1830, now-President Jackson authorized negotiations with the Choctaw for their removal to lands west of the Mississippi River. DeRosier at 97-112. President Jackson told Congress in 1829 that he would "guarantee[]" land for the Choctaw "for as long as they occupied the land," that the land would be "free of white men except for a few soldiers," and that "removal to such a Utopia would be voluntary, but

if the Indians remained east of the Mississippi River, they would be subject to the laws of the several states." *Id.* at 104. The ensuing negotiations resulted in the Treaty of Dancing Rabbit Creek. *Id.* at 119.

In light of the treaty's broad language and the events preceding it, a state law that taxes the wages the Tribe pays to a member-employee (a "descendant" of the Tribe) is properly regarded as a prohibited "law[] for the government of the [Chickasaw] Nation." That understanding is reinforced by the precept that a treaty is to be read as the Indian signatories would have understood it, with "[d]oubtful expressions * * * resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *McClanahan*, 411 U.S. at 174. The Commission argues (Br. 42) that an income tax law would not have been perceived as a law "for the government" of the Chickasaw Nation, because imposition of such a tax "displaces [no] mechanisms of tribal government." But the treaty does not bar only those state laws that disrupt or rearrange tribal government; it bars all laws "for the government of" the Tribe's members. Given the absence of any role for the State over tribal members at the time of the treaty, a law that taxed a member for wages paid by the Tribe on tribal land undoubtedly would have been so regarded. See *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, 635 (1970).[16]

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[16] In any event, even if the Commission were correct that the treaty protected members only from laws that "displace[] the mechanisms of tribal government" (Br. 42), and even if the tribal signatories are assumed to have shared in that view, state tax laws at the time were understood to have just that effect. See *Dobbins* v. *Commissioners of Erie County*, 41 U.S. (16 Pet.) 434, 447-449 (1842) (holding, under then-extant federal instrumentality doctrine, that salaries of federal employees were exempt from state taxation, because such taxation constituted interference with federal government).

The Commission also argues (Br. 45-47) that Oklahoma's admission into the Union—which overrode the treaty guarantee that "no part of the land granted [to the Chickasaw] shall ever be embraced in any * * * State"—necessarily also overrode the separate guarantee that "no * * * State shall ever have a right to pass laws for the government" of the Chickasaw Nation. But when Congress admitted Oklahoma, it explicitly provided that "[n]othing contained in [the Oklahoma Constitution] shall be construed to limit or impair the rights of any person or property pertaining to the Indians of said Territories." Oklahoma Enabling Act, ch. 3335, § 1, 34 Stat. 267-268; Pet. App. 29a. See *United States* v. *Dion*, 476 U.S. 734, 738-739 (1986) ("We have required that Congress' intention to abrogate Indian treaty rights be clear and plain," and "[a]bsent explicit statutory language, we have been extremely reluctant to find congressional abrogation.").

The broad language of the treaty does not, of course, deprive Oklahoma of all power over the activities of Chickasaw Indians in the State. Where the conduct of the Indians occurs outside of Indian country, Oklahoma of course remains free to regulate that conduct.[17] It may be that a State would have some authority to act with respect to conduct occurring within Indian country but having substantial effects outside, perhaps subject to the particularized balancing inquiry utilized by this Court. But a tribal member's receipt of wages from the Chickasaw Nation for work performed for the Tribe within its trust lands does not have any such effect. While Oklahoma may assess its residents for the privilege of

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[17] Oklahoma has not acquired general civil or criminal jurisdiction over matters involving Indians in Indian country under Public Law 280 (Pub. L. No. 83-280), 67 Stat. 588, codified as amended at 25 U.S.C. 1321 *et seq.* *Potawatomi Tribe*, 498 U.S. at 513.

enjoying the services the State provides to them, a tax upon the wages of a Chickasaw Nation member-employee (whatever the amount of those wages) is in no way tailored to reflect the costs imposed upon Oklahoma by the fact that that tribal member resides within the State. Cf. *Sac and Fox*, 113 S. Ct. at 1993 (state car registration tax tailored to capture the off-reservation effects of automobile use might be permissible, but a blanket tax is not). Oklahoma may therefore not assert that, solely by living outside Indian country, a Chickasaw Nation descendant who works for the Tribe categorically waives his right under the treaty to be free from state income tax laws.

2. Apart from the distinct immunity from state law conferred on the Chickasaw Nation by the treaty, tribal members have the right to "make their own laws and be ruled by them." See, *e.g.*, *White Mountain Apache*, 448 U.S. at 142 (quoting *Williams* v. *Lee*, 358 U.S. 217, 220 (1959)). This Court has left open the question whether a Tribe's right to self-governance operates "independently of its territorial jurisdiction to pre-empt the State's ability to tax income earned from work performed for the Tribe itself when the employee does not reside in Indian country," *Sac and Fox*, 113 S. Ct. at 1992, and, if so, whether such preemption exists in all cases, or depends upon a "particularized inquiry into the nature of the state, federal, and tribal interests at stake." *Mescalero Apache Tribe*, 462 U.S. at 333. The court of appeals took the position that a particularized showing would be necessary to establish tax immunity, but, because of its reliance on the treaty, it did not consider the various factors germane to that inquiry. Nor does the record in this case contain the facts necessary for such an inquiry. Should the Court hold that the treaty does not resolve the issue of whether the State may tax the income of nonresident member-employees of the Tribe, a remand would be appropriate to

determine whether imposition of that tax would infringe on tribal self-government.[18]

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[18] The circumstances of this case suggest the basis for a substantial argument that the tax infringes on the Tribe's interest in self-government. The income in question is paid by the Tribe to its members as compensation for work performed for the Tribe itself, and it appears that much of that income is received in return for services rendered at tribal headquarters or in connection with tribal administration. See Resp. First Amended Compl. ¶ 36 (tribal employees work, *inter alia*, at tribal headquarters, health center, office of environmental health, central business services office, utility authority, and gaming commission office). Hence, it seems likely that the tax burdens tribal administration by increasing the cost to the Tribe of administering its affairs, in areas subject to tribal jurisdiction. The tax may also impede the Tribe's ability to collect taxes from its employee-members on the income it has paid them, or, alternatively, to compete for employees. That is because Oklahoma, in calculating a resident's income taxes due, does not credit the resident for income taxes paid to a sovereign Tribe, even though the State in other contexts takes steps to avoid double-taxation. See, *e.g.*, Okla. Stat. Ann. tit. 68, § 2358(A)(4) (1992) (resident's income earned in other States is not included in resident's income tax base); see also 2 J. Hellerstein & W. Hellerstein, *State Taxation* ¶ 20.04[2], at 20-14 (1992) ("To avoid double taxation of their residents' income that is attributable to and taxed in other States, all States with broad-based income taxes provide a credit for taxes paid by their residents to other States.").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

PAUL A. ENGELMAYER
Assistant to the Solicitor General

ELIZABETH ANN PETERSON
Attorney

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